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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

No. 81-6711

DARRELL WAYNE HILL — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
ATTORNEY GENERAL

BY: LESLIE M. POWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
ATTORNEYS FOR RESPONDENT

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Respondent, State of Arkansas, responds to petitioner's petition for writ of certiorari to the Supreme Court of Arkansas.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the search of Petitioner's vehicle violated the requirements of Belton v. New York, ____U.S.____(1981), 69 L.Ed. 2d 768 and Adams v. Williams, 407 U.S. 143 (1971)?

2. Whether the Arkansas Supreme Court's assumption of facts not contained in the record but within the State's burden of proof in regards suppression of evidence seized without a search warrant violated Petitioner's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Whether the trial court conducted the aggravation- mitigation phase of the trial in such a way as to deny petitioner the entry into evidence proffered evidence properly allowable under the doctrine of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, ____U.S.____ (1981)?

4. Whether the introduction during the enhancement-aggravation/ mitigation phase of the proceedings of evidence of prior convictions based upon pleas of guilty without representation by legal counsel violated the dictates of Baldasar v. Illinois, 446 U.S. 222 (1980)?

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STATUTES

Ark. Stat. Ann. §41-1301 - §41-1351 (Repl. 1977)

Ark. Stat. Ann. §41-1001 (Repl. 1977)

Rule 17.1(c), Rules of the Supreme Court of the United States

OPINIONS BELOW

The opinion of the Arkansas Supreme Ccurt affirming petitioner's conviction and sentences of life imprisonment, death and two fifty year terms is reported at Hill v. State, ___ Ark. _____ (Feb. 8, 1982). Two other fifty year sentences for underlying felonies were vacated by the Court. A copy of the opinion is reproduced in petitioner's appendix.

JURISDICTION

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

§ 41-1301. Trial of Persons Charged with Capital Murder.--- The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) [§ 41-1302]; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 [§ 41-1303], or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 [§ 41-1303] shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencings. [Acts 1975, No. 280 § 1301, p. 500.]

STATEMENT OF THE CASE

On February 11, 1980, petitioner was charged by an information filed in the Circuit Court of Montgomery County, Arkansas, with capital murder, attempted capital murder, two counts of aggravated robbery and two counts of kidnapping. It was alleged that the petitioner kidnapped and robbed at gunpoint E. L. Ward, a gas station attendant, and Donald Lee Teague, a Game and Fish Commission officer. After driving to a secluded area, petitioner shot and killed Teague and shot and wounded Ward.

The crime occurred early in the afternoon on February 7, 1980. The petitioner was arrested within a few hours in a neighboring county. Petitioner filed a motion to suppress evidence seized at his arrest. At an omnibus hearing following the presentation of evidence on this issue, said motion was denied.

The case was tried before a jury from July 7 to July 11, 1980. At the conclusion of the evidence which included psychiatric evidence and rebuttal on the defense of mental disease, appellant was found guilty as charged.

Evidence was then received relevant to sentencing. The jury returned the verdicts with sentences of death by electrocution on the capital murder charge, life on the attempted capital murder charge and fifty years each on the two kidnapping and two aggravated robbery charges. The court entered judgment on July 11, 1980 pursuant to these verdicts and set October 7, 1980 as the date of execution.

The conviction was affirmed on appeal. A petition for rehearing was denied on March 15, 1982.

REASONS FOR DENYING THE WRIT

I.

THE WARRANTLESS SEARCH OF PETITIONER'S VEHICLE WAS REASONABLE UNDER THE CIRCUMSTANCE WHICH ESTABLISHED BOTH PROBABLE CAUSE FOR A SEARCH INCIDENT TO ARREST AND FACTS JUSTIFYING A PROTECTIVE SEARCH FOR WEAPONS.

Petitioner filed a motion to suppress items seized during the warrantless search of his vehicle at the time of his arrest. The arrest itself was not challenged. The trial court denied the motion following a hearing at which the two arresting officers testified. The Arkansas Supreme Court affirmed this decision on appeal.

Officer Buck testified that he stopped the petitioner's car based on its matching the description given by the radio transmission. The radio transmission was based on information supplied by the surviving victim of the crime. It included a description of the suspect's car, its license tag and the suspect himself. It also included the information that the suspect was armed and extremely dangerous as he had robbed and kidnapped two individuals, killed one of them and attempted to kill the other.

Officer Buck instructed the petitioner over the public address system to exit his vehicle. Officer Ward had arrived at this time to back-up Officer Buck. As Buck detained the appellant at the back of the car, Ward quickly checked the immediate area around the driver's seat. He found a Charter Arms .38 Special in a sack with a large amount of coins. Shots from the gun were later tested and compared to bullets removed from both victims with positive results. Following the search, the petitioner was formally placed under arrest.

The Arkansas Supreme Court unanimously found that probable cause existed for appellant's arrest based on the descriptions of the suspect and his car. Thus, the search was justified as being incident to an arrest, citing New York v. Belton, ___ U.S. ___ (1981) A majority of the court also held that under

the totality of the circumstances, the search could also be justified as a limited search for weapons following an investigatory stop, citing Adams v. Williams, 407 U.S. 143 (1972) and Terry v. Ohio, 392 U.S. 1 (1967).

Petitioner attacks the "arrest" theory because the search preceded the formal arrest. He attacks the "weapons" theory as the petitioner had exited the car where the weapon was actually found. Respondent submits that the Arkansas Supreme Court properly applied the appropriate legal concepts to the facts of this case.

The actions of the police officers clearly establish that they were operating under the reasonable belief that they had the armed and extremely dangerous suspect in custody. The suspect, his car and the tag, all accurately fit the detailed descriptions which had been broadcast. Officer Buck did not approach the petitioner until he had instructed him over the public address system to exit the vehicle and keep his hands in plain sight. The search of the vehicle for weapons and the frisk of petitioner's person occurred virtually simultaneously by the two officers. The petitioner was then placed under formal arrest. According to the police log only twenty minutes elapsed between the first call that a stop was going to be made until the subseqeunt call that the suspect was in custody.

The reasonableness of the officers' actions is established by the particularized descriptions of the vehicle, the tags and the suspect himself. The unique combination of these three descriptions combined with the proximity in time and space of the stop and the crime accurately focused suspicion on the petitioner. The officers acted responsibly in using utmost caution in stopping the vehicle and approaching the petitioner.

As the officers had the petitioner effectively in custody, and had probable cause to believe he had committed multiple felonies, their search was justified both as incident to the arrest and as a protective search for weapons under Belton, Terry and Adams.

II.

THE SUPREME COURT OF ARKANSAS PROPERLY BASED ITS OPINION UPON FACTS WHICH WERE IN EVIDENCE.

The petitioner attacks the Arkansas Supreme Court's opinion as assuming facts not in evidence in holding that "It was not likely that another vehicle of that description was in the Montgomery-Garland County area at that time." Respondent submits that the opinion of the court was properly based upon facts which were in evidence.

The police radio broadcast included the description of the vehicle, a late model maroon Ford Thunderbird; the car tags, white background and dark letters; and the suspect. Though the police could not completely see the driver until he exited the car, they were aware that they were seeking a lone male driver. The proximity in time and space was also a crucial factor, i.e. the crime was committed just a few hours earlier with the initial radio broadcast being even more recent and the crime was committed in the neighboring county.

Certainly, the Arkansas Supreme Court took all these factors into consideration in holding that the stopped vehicle was an "uncommon" one; it was not the vehicle alone, but the juxtaposition of all of these facts which support that conclusion. Certainly, the State met its burden under Coolidge v. New Hampshire, 403 U S. 443 (1971) in introducing sufficient facts to justify the search.

III.

THE PETITIONER WAS NOT DENIED THE OPPORTUNITY TO INTRODUCE PROPER MITIGATION TESTIMONY DURING THE PENALTY PHASE OF THE TRIAL.

Petitioner called Rev. Victor H. Nixon, a Methodist minister, to testify on mitigating circumstances in the penalty phase of the trial. The witness was trained in counseling and in the religious and ethical considerations relevant to the death penalty. He had met with the petitioner after he was charged with capital murder for two one-hour sessions.

The State objected several times during Nixon's testimony on two different grounds, relevancy and hearsay. The State first objected to the relevancy of the background of the witness and his experience in counseling. The petitioner's proffer was that Rev. Nixon would testify as to petitioner's personal history and the religious and ethical considerations applicable to the death penalty. The court expressed its concern about the latter going to the legality of the death penalty and not mitigating circumstances, but allowed the testimony to continue over the State's objection.

The State next objected on hearsay grounds when the witness testified as to his conversations with the petitioner. The court overruled the objection, stating that the witness could establish the foundation for his opinion that the petitioner was not a proper candidate for the death penalty. The State objected when the witness testified that the victim wanted to donate a kidney. The trial court sustained this objection, but encouraged counsel for petitioner to continue with his examination of the witness. Petitioner's counsel made the decision to pass the witness.

In construing Ark. Stat. Ann. § 41-1301 (4) (Repl. 1977) in a recent decision, Hobbs v. State, 273 Ark. 125, 617 S.W.2d 347 (1981), the court stated:

> While evidence offered in mitigation should not be refused simply because it would not be admissible in a trial, that does not mean that it does not have to have some relevant or probative value regarding the mitigation. The statute tends to relax the requirements of admissibility. That relaxation would go to perhaps authenticity or in the case of testimony, perhaps hearsay, either of which might prevent admissibility in a trial. That does not mean that the General Assembly intended to totally open the door to any and all matters simply because mitigation is the issue.

Nixon's testimony primarily covered the personal background of the appellant, as related to him by the appellant himself. The witness' knowledge of the appellant was obviously very limited due to his having only met with him for two hours. Though the appellant could have taken the stand in his own behalf, the trial court did not sustain a hearsay objection by the State on this basis.

The trial court sought to guide counsel on the relevancy objections. Clearly a dissertation on the religious and ethical considerations applicable to the death penalty per se are not relevant to a jury's consideration of the imposition of a death sentence in a particular case.

In examining state statutory provisions with regard to mitigating factors, the United States Supreme Court uniformly refers to evidence relevant to the particular defendant or the particular offense. See Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976).

Other state supreme courts have dealt with this issue and held that evidence offered in mitigation must be relevant to the defendant himself or to the crime at issue. Franklin v. State, 245 Ga. 141, 263 S.W.2d 666 (1980); Irving v. State, 316 So.2d 1360 (Miss. 1978), cert. denied, 441 U.S. 913 (1979); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979); cert. denied, 444 U.S. 1103 (1980). In Franklin, after reviewing defendant's proffer of testimony by a reporter, a prison chaplain and a professor of religion, the Georgia Supreme Court upheld the trial court's exclusion of this testimony in that "descriptions of executions and of life on death row, statistics relating to executions, and religious and philosophical approaches to the death penalty" are not relevant as mitigating evidence. Franklin v. State, 263 S.W.2d at 672-73.

Respondent submits that the trial court properly ruled on objections made during the mitigation testimony of Rev. Nixon. The witness was properly allowed to testify as to the petitioner's personal history which affected his character. If the witness had more to offer on how the petitioner's background related to the specific crime, it was encumbent upon the petitioner to continue the examination of this witness which he chose not to do. The limitation by the trial court of the testimony of this witness to evidence relevant to the issue of mitigation for this particular defendant and this particular crime was entirely proper under Arkansas law and the United States Constitution.

IV.

EVIDENCE OF PRIOR CONVICTIONS WAS PROPERLY ADMITTED INTO EVIDENCE DURING THE PENALTY PHASE OF THE TRIAL.

Petitioner was charged with and found guilty of two counts of kidnapping, two counts of aggravated robbery and attempted capital murder. The sentences for these charges were subject to enhancement under Ark. Stat. Ann. § 41-1001 (Repl. 1977). Appellant was also charged with and found guilty of capital murder. The sentence for this offense is decided under procedures outlined in Ark. Stat. Ann. § 41-1301 to § 41-1351 (Repl. 1977).

During the penalty phase of the bifurcated trial, the State introduced evidence of five prior felony convictions. The petitioner was represented by counsel at each of these convictions.

Date	Case No.	Charges	State
3-25-64	20487	Unauthorized use of a motor vehicle after former conviction of a felony	Oklahoma
3-25-64	20488	Possession of a firearm after former conviction of a felony	Oklahoma
9-12-68	6437	First degree robbery	Missouri
9-9-70	CRF-70-689	Carrying firearms after former conviction of a felony.	Oklahoma
9-9-70	CRF-70-690	Robbery with firearms after former conviction of felony	Oklahoma

The trial court clearly instructed the jury that they were to consider only the robbery convictions, Case No. 6437 and Case No. 79-690 as aggravating circumstances. The other convictions were to be considered only for enhancement purposes on the other charges. The petitioner objected to this procedure.

The Jury did find as an aggravating circumstance on the capital murder charge that the petitioner had committed another felony which had as an element the use or threat of violence to another person or creating substantial risk of death or serious physical injury to another person. The jury also found on each of the other charges that petitioner had been convicted of four or more prevous felonies. The two robbery convictions were competent evidence upon which to base a finding of an aggravating circumstance. Even without the previous convictions, the other aggravating circumstances which

the jury found would be sufficient to uphold the death penalty.

The four Oklahoma convictions refer to former convictions. Of course, there is no problem with the two September 1970 convictions referring to prior convictions as the two March of 1964 convictions are in evidence. The March of 1964 convictions refer to a former conviction which is not in evidence and for which it is unknown whether the appellant was represented by counsel. Lack of representation on the pre-1964 conviction was a proper consideration in 1964 when the petitioner was represented by counsel. It is not a consideration now even as a collateral matter under Baldasar v. Illinois, 446 U.S. 222 (1980).

Respondent submits that evidence of prior convictions was properly admitted into evidence during the penalty phase of the trial. Certainly there is no question that the death penalty was based upon counseled prior convictions for violent crimes. The life sentence and the remaining fifty year terms underlying the life sentence were properly enhanced by consideration of the five counseled prior convictions. The mere possibility that the pre-1964 conviction underlying the 1964 convictions was not counseled is irrelevant as that conviction was not before the jury.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefore. Subsection (c) provides that such writs will be granted when a state court has decided a federal question in a way which conflicts with applicable decisions of this Court or if it has decided an important question of federal law which has not been, but should be, settled by this Court.

Although respondent recognizes that review on writ of certiorari is discretionary, and that the Court is not bound by the guidelines of Rule 17.1(c), it respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his

direct appeal.

Therefore, for these reasons and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

STEVE CLARK
ATTORNEY GENERAL

By: Leslie M Powell
LESLIE M. POWELL
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Leslie M. Powell, Assistant Attorney General, do hereby certify that a copy of the foregoing Response has been served on petitioner herein, by mailing a copy of same, postage prepaid, addressed to his attorney, William H. McKimm, 135 Elder Street, Mt. Ida, Arkansas 71957, this 21st day of June, 1982.

Leslie M Powell
LESLIE M. POWELL